Supreme Court, U.S.
FILED

081465 MAY 27 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 09-____

IN THE
Supreme Court of the United States

CARLOS J. RODRIGUEZ,
Gunnery Sergeant, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

Brian D. Korn
Lieutenant, USN
Counsel
1254 Charles Morris St. SE, Bldg 58, Suite 100
Washington, D.C. 20374
(202)685-8516

Dillon J. Ambrose
Lieutenant, USN
Counsel of Record
1254 Charles Morris St. SE, Bldg 58, Suite 100
Washington, D.C. 20374
(202)685-7390

QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces misapplied this Court's jurisdictional decision in *Bowles v. Russell*, 551 U.S. 205 (2007), thereby denying Petitioner servicemember his statutory right to appeal his court-martial conviction.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 1
STATUTES AND REGULATIONS INVOLVED 1
STATEMENT 1
REASON FOR GRANTING THE PETITION 2

The lower court misapplied this Court's jurisdictional decision in *Bowles v. Russell*, 551 U.S. 205 (2007), thereby denying Petitioner servicemember his statutory right to appeal his court-martial conviction.

CONCLUSION 15
APPENDIX 1a
Court of Appeals for the Armed Forces Decision ... 1a
Court of Appeals for the Armed Forces Order 41a
Relevant Statutes and Rules 43a

TABLE OF AUTHORITIES

Cases

Arbaugh v. Y & H Corp.,
546 U.S. 500 (2006).....10

Bowles v. Russell,
551 U.S. 205 (2007).....passim

Kennedy v. Louisiana,
129 S. Ct. 1 (2008).....11

Parker v. Levy,
417 U.S. 733 (1974).....11, 12

United States v. Byrd,
53 M.J. 35 (C.A.A.F. 2000).....6, 13, 14

United States v. Ferguson,
40 M.J. 823 (N-M. Ct. Crim. App. 1994)..... 10

United States v. Larneard,
3 M.J. 76 (C.M.A. 1977).....13

United States v. Marcum,
60 M.J. 198 (C.A.A.F. 2004).....12

United States v. Morris,
16 M.J. 101 (C.M.A. 1983).....13

United States v. Ponds,
1 C.M.A. 385 (1952) (per curiam).....6, 13, 14

United States v. Rodriguez,
67 M.J. 110 (C.A.A.F. 2009).....2, 7

United States v. Starr,
51 M.J. 528 (C.A.A.F. 1999).....10

United States v. Tamez,
63 M.J. 201 (C.A.A.F. 2006) (per curiam).....6

Statutes

10 U.S.C. § 867.....passim

28 U.S.C. § 2107..... 3, 4, 10

Other Authorities

Hearing on H.R. 2498 Before the H. Comm. on Armed Services, 81st Cong. 823 (1940).....7

Military Justice Act of 1983, Pub. L. 98-209,
97 Stat. 1393.....13

Military Justice Amendments of 1981,
Pub. L. No. 97-81, § 5, 95 Stat. 1085.....9, 10, 13

S. Rep. No. 98-53 (1983).....14

Rules

Fed. R. App. P. 4(a)(6).....9

PETITION FOR A WRIT OF CERTIORARI

Gunnery Sergeant Carlos J. Rodriguez, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (App., *infra*, 1a-33a) is reported at 67 M.J. 110.

JURISDICTION

The decision of the Court of Appeals for the Armed Forces was entered on January 6, 2009. A petition for reconsideration was denied on March 4, 2009. App., *infra*, 34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

STATUTES AND REGULATIONS INVOLVED

Article 67 of the Uniform Code of Military Justice, 10 U.S.C. § 867; 28 U.S.C. § 2107; and Fed. R. App. P. 4 are set out in Appendix C.

STATEMENT

Gunnery Sergeant Carlos J. Rodriguez was convicted at a general court-martial of four offenses involving sexual acts with children. In its initial

review of the case, the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) set aside two specifications and authorized a rehearing. *United States v. Rodriguez*, No. 9900997, 2002 CCA Lexis 259 (N-M. Ct. Crim. App. Oct. 25, 2002) (unpublished).

At the rehearing, Petitioner was found guilty of two offenses involving sexual acts with children. In its second review of the case, NMCCA affirmed the findings and sentence. *United States v. Rodriguez*, No. 9900997, 2007 CCA LEXIS 251 (N-M. Ct. Crim. App. July 17, 2007) (unpublished).

The Court of Appeals for the Armed Forces (CAAF) initially granted Petitioner's petition for review on two issues, but then vacated the grant of review and dismissed Petitioner's petition based on CAAF's interpretation of this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007).

REASON FOR GRANTING THE PETITION

The lower court misapplied this Court's jurisdictional decision in *Bowles v. Russell*, 551 U.S. 205 (2007), thereby denying Petitioner servicemember his statutory right to appeal his court-martial conviction.

In a divided 3-2 decision, CAAF found that, based on this Court's ruling in *Bowles*, Article 67, Uniform Code of Military Justice (UCMJ), prohibits appellants from submitting petitions for grant of review outside of Article 67's 60-day filing deadline. *United States v. Rodriguez*, 67 M.J. 110 (C.A.A.F. 2009). The lower court erroneously applied *Bowles* to

Article 67. In *Bowles*, this Court found that filing an appeal outside of the statutory filing window set forth in the Federal Rules of Civil Procedure is a jurisdictional bar to an appeal. *Bowles*, 551 U.S. at 208. The holding in *Bowles*, however, was limited to the contours of the particular statute at issue in that case and is not applicable in military jurisdictions. The *Bowles* Court merely ruled that the Federal Rules of Civil Procedure's time limits on petitions are jurisdictional in nature. The *Bowles* Court did not address Article 67.

Article 67, the jurisdictional statute at issue in this case, differs significantly from the statute at issue in *Bowles*. Article 67, UCMJ, 10 U.S.C. § 867 (2006). Under the *Bowles* statute, 28 U.S.C. § 2107, Congress gave courts only limited discretion to reopen the filing period under specific circumstances:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree . . . .
>
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing

> appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds -- (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and (2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal. 28 U.S.C. § 2107.

By contrast, Congress did not intend Article 67 to limit appellate review of courts-martial:

> (a) The Court of Appeals for the Armed Forces shall review the record in—
> (1) all cases in which the sentence, as affirmed by a

Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is

> deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. Article 67, UCMJ.

Since the creation of the UCMJ, CAAF has held that time limits for filing a petition do not impose a jurisdictional bar to appeal if there is good cause for filing out of time. *United States v. Tamez*, 63 M.J. 201, 202-03 (C.A.A.F. 2006) (per curiam); *United States v. Byrd*, 53 M.J. 35, 38 (C.A.A.F. 2000); *United States v. Ponds*, 1 C.M.A. 385, 387 (1952) (per curiam). The reason CAAF permitted late filings is that Article 67 is phrased in terms of the opportunity for an appellant to file a petition for review. *Byrd*, 53 M.J. at 38. The statute does not state that the time periods are jurisdictional, nor does it preclude CAAF from accepting petitions outside the time period under certain circumstances. *Id.*

Such a practice is consistent with Congress's intent that servicemembers have the opportunity to obtain appellate review in a civilian court. *Tamez*, 63 M.J. at 202. The lower court's decision, however, reverses over fifty years of consistent precedent because the lower court mistakenly believed that "Congress established without qualification when

such petitions must be filed." *Rodriguez*, 67 M.J. at 115.

Congress was concerned about how Article 67 would affect the rights of servicemembers when debating the very first version of the UCMJ:

> Another difficulty with this . . . the accused will often learn too late, if at all, of his right to appeal. He is not in a position to take the initiative. His defense counsel may have been transferred to another command, and the accused loses out in the shuffle. *Hearing on H.R. 2498 Before the H. Comm. on Armed Services*, 81st Cong. 823 (1940) (statement of Robert D. L'Heureux, Chief Counsel, Senate Banking and Currency Committee).

This quote is indicative of the overwhelming policy concerns facing Congress when drafting Article 67. Military appellants are unlike appellants in any other jurisdiction. Military appellants are spread all over the world. The military appellate courts, however, are all situated in Washington, D.C. Therefore, very few appellants are located anywhere near their appellate counsel. Military appellate defense counsel serve, at most, for three years in that position. With lengthy appellate processing

times and frequent attorney turnover, it is not unusual for any given appellant to be represented by multiple appellate defense counsel over the course of their appeals. Finally, it is the government's job to maintain contact information for each individual appellant. Therefore, if the government fails to maintain current information, it becomes nearly impossible for an appellate defense counsel to reach an appellant.

While such policy rationale may be irrelevant if Article 67 is indeed jurisdictional, it is wholly relevant in trying to determine what Congress considered and intended when drafting Article 67. Based on the clear language in the legislative history, indicating a concern for an appellant's ability to learn of his pending appeal in a timely fashion, it is clear that Congress considered such policy concerns, which leads to the reasonable assumption that Article 67 was not intended to be jurisdictional.

The lower court erred by finding that *Bowles* dictates a result. Instead, *Bowles* merely states a rule of interpretation. Where Congress has prescribed a time limit for filing an appeal, that time limit is "'mandatory and jurisdictional.'" *Bowles*, 551 U.S. at 207 (citations omitted). However, if a time period in a statute does not prescribe a jurisdictional limit, it is not mandatory. The *Bowles* Court did not intend to substitute an overarching rule of statutory construction for the actual statutory language or congressional intent of a particular statute. Despite the lower court's misinterpretation of *Bowles*, not all timelines are jurisdictional. *Bowles* 551 U.S. at 217 (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting).

The *Bowles* Court determined that 28 U.S.C. § 2107(c) is jurisdictional "[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period." *Bowles*, 551 U.S. at 213. Fed. R. App. P. 4(a)(6), which implements § 2107(c), states "[t]he district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied." Article 67, however, uses no similar prescriptive language.

Article 67 does not prescribe CAAF's jurisdiction in the same way 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(6) restricted the district court's jurisdiction in *Bowles*. First, Article 67 allows for a permissive right to petition, stating that an "accused *may* petition" CAAF. Article 67, UCMJ (emphasis added). Second, Congress did not specifically limit the amount of time in which an accused may file a petition, it simply required that CAAF must review all petitions filed within sixty days. After sixty days, CAAF has discretion whether to consider a petition. Third, Congress chose not to prohibit this discretion when, in 1981, Congress changed the verb in Article 67(b) from "shall" to "may" without making any additional changes to restrict CAAF's jurisdiction. *See* Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085, 1088-89.

The word "may" is one of option and discretion, where "must" or "shall" are words of mandate. Although a fair reading of the statute is that the term "may" means that an appellant has the option of whether or not to appeal at all, it is also a reasonable reading to interpret "may" as making the 60-day timeline non-compulsory. As such, the plain

language of the statute is ambiguous as to whether this time limit is mandatory. In view of the doctrine that ambiguous statutes are interpreted in favor of an accused, the statute does not create a mandatory time limit to petition CAAF. *United States v. Starr*, 51 M.J. 528, 532 (C.A.A.F. 1999) (citing *United States v. Ferguson*, 40 M.J. 823, 830 (N-M. Ct. Crim. App. 1994)); *see, e.g., Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding that when Congress does not specifically rank a statutory limitation as jurisdictional, courts should treat the restriction as nonjurisdictional in character).

By contrast, the federal statute at issue in *Bowles* states "[e]xcept as otherwise provided in this section, no appeal *shall* bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days." 28 U.S.C. § 2107 (emphasis added). The mandatory nature of this timeline is evident by a plain reading of the statute, but the same cannot be said of Article 67.

In 1981, Congress changed section (b) of Article 67 from "shall" to "may" while extending the period during which an appellant may file a petition to CAAF. Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085. But Congress did not choose to alter CAAF's jurisdiction at the same time. Despite 29 years of CAAF precedent interpreting Article 67 as granting a permissive right to an appellant to petition, as opposed to a prescription on the jurisdiction of CAAF, Congress still chose not to specifically limit CAAF's jurisdiction. Instead, Article 67(a) continues to state that CAAF "shall review" the record in all cases upon petition of the accused and

on good cause shown, rather than saying CAAF shall review only timely petitions. Article 67, UCMJ.

Lastly, nothing within Article 67 states that an appellant *cannot* appeal after 60 days. While an appellant *may* appeal within 60 days, the statute arguably allows for further review as well.

The lower court, however, found that there is only one possible way to read the statute, an interpretation that is inconsistent with how Article 67 has been interpreted for over fifty years. This Court in *Bowles* did not modify the existing state of the law, it only insisted that courts give full effect to statutory timelines where "Congress specifically limited the amount of time" within which a court is authorized to hear an appeal. *Bowles*, 551 U.S. at 213. The lower court erred because Congress has not "specifically limited the amount of time" within which CAAF may consider a petition for review.

Military Courts are Different

As this Court recognized in *Parker v. Levy*, 417 U.S. 733, 743 (1974), the military justice system is a distinct system. Supreme Court precedent does not always apply in a military context, and sometimes applies differently to the military than it does in a civilian context. *See Kennedy v. Louisiana*, 129 S. Ct. 1, 2 (2008).

This Court has repeatedly recognized that military society is distinct from civilian society. Therefore, this Court's precedent may apply differently, or may not apply at all, in military courts. *See Parker*, 417 U.S. at 744.

It is CAAF's responsibility to interpret this Court's precedent and apply it to the military. *See United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) ("[W]hen considering how [certain laws] apply in the military context, CAAF has relied on Supreme Court civilian precedent, but has also specifically addressed contextual factors involving military life."). A crucial aspect of military justice is the focus Congress placed on the opportunity for servicemembers to appeal convictions to a civilian appellate court. The lower court ignores this fact, however, trying to fit the facts of the present case into the holding of *Bowles*, while missing the compelling language from *Parker* regarding the distinctions between civilian and military law. In a misguided attempt to follow *Bowles*, a ruling interpreting dissimilar language in a civilian statute, the lower court erroneously concluded that its interpretation of Article 67 has been wrong for more than 50 years.

The *Bowles* Court did not decide that all statutes with timelines are jurisdictional. Instead, *Bowles* merely stands for the fact that, where Congress specifically intended to set forth a jurisdictional timeline, a court cannot extend that timeline. Based on the plain language used in Article 67, and the history and context surrounding the statute, it is clear that Congress did not intend the timeline in Article 67 to be jurisdictional.

History of the Article 67

From the inception of the UCMJ, CAAF interpreted Article 67 to permit petitions filed

beyond the statutory time period upon a showing of good cause. *Ponds*, 1 C.M.A. at 386. In 1977, CAAF decided *United States v. Larneard*, 3 M.J. 76 (C.M.A. 1977), which held that constructive service of the lower court's decision was insufficient to initiate the period for review, and the filing period would therefore not begin without actual notice. Responding to *Larneard* in 1981, the Department of Defense requested amendments to Article 67 in order to make it easier to identify the time marking the start of the opportunity to petition CAAF for review. *See Byrd*, 53 M.J. at 36. The proposed legislation was responding to CAAF's decision in *Larneard*. S. Rep. No. 97-146, at 35 (1981).

Congress responded to the Department of Defense by allowing for the use of constructive notice, thereby negating CAAF's decision in *Larneard*. Military Justice Amendments of 1981, Pub. L. No. 97- 81, § 5, 95 Stat. 1088-89 (codified as amended at 10 U.S.C. § 867). Under constructive notice, the opportunity to petition for review begins when the government provides the appellant either actual or constructive notice of the lower court's decision. It is telling that while Congress addressed CAAF's interpretation of Article 67 to establish a constructive notice provision in light of *Larneard*, the amended statute did not seek to overturn or modify the *Ponds* line of cases.

After the 1981 legislation, CAAF continued to accept late petitions upon a demonstration of good cause. *See, e.g., United States v. Morris*, 16 M.J. 101 (C.M.A. 1983). If that interpretation had been incorrect, Congress could have acted during its consideration of the Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393. That legislation

contained significant changes to post-trial procedures and the appellate process, with particular attention to the impact of CAAF's case law. *See, e.g.*, S. Rep. No. 98-53, at 28 (1983). Congress, however, did not act to prevent CAAF's consideration of late petitions.

The permissive reading of Article 67 is also consistent with the manner in which Congress has structured the military justice system. All appellants are provided military appellate counsel by the government. *See* Article 70, UCMJ. When a petition is filed late because of a mistake or inaction by the assigned military counsel, the *Ponds* interpretation of Article 67 provides an opportunity for the appellant to demonstrate that the late filing is the fault of the government-provided attorney. *See Byrd*, 53 M.J. at 36-37.

Therefore, because both the express language of Article 67 and the history of the statute demonstrate that Congress never intended the filing deadline to be jurisdictional, the lower court erred in denying Petitioner's petition for grant of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian D. Korn
Lieutenant, USN
Counsel
1254 Charles Morris St. SE
Bldg 58, Suite 100
Washington, D.C. 20374
(202)685-8516

Dillon J. Ambrose
Lieutenant, USN
Counsel of Record
1254 Charles Morris St. SE
Bldg 58, Suite 100
Washington, D.C. 20374
(202)685-7390

APPENDIX A

UNITED STATES, Appellee v. Carlos J. RODRIGUEZ, Gunnery Sergeant U.S. Marine Corps, Appellant

No. 07-0900

Crim. App. No. 9900997

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

67 M.J. 110, 2009 CAAF LEXIS 2

Argued September 23, 2008

Decided January 6, 2009

ERDMANN, J., delivered the opinion of the court, in which STUCKY and RYAN, JJ., joined. EFFRON, C.J., and BAKER, J., each filed a separate dissenting opinion.

Counsel

For Appellant: Lieutenant Brian D. Korn, JAGC, USN (argued).

For Appellee: Lieutenant Timothy H. Delgado, JAGC, USN (argued); Major Brian K. Keller, USMC (on brief); Commander Paul C. LeBlanc, JAGC, USN.

Military Judge: R. S. Chester

Judge ERDMANN delivered the opinion of the court.

Gunnery Sergeant Carlos J. Rodriguez was convicted at a general court-martial of four offenses involving unlawful sexual acts with children. In its initial review of the case, the United States Navy-Marine Corps Court of Criminal Appeals set aside two specifications and authorized a rehearing. United States v. Rodriguez, No. NMCCA 9900997, 2002 CCA Lexis 259, 2002 WL 31433595 (N-M. Ct. Crim. App. Oct. 25, 2002) (unpublished). At the rehearing, Rodriguez was found guilty of two offenses involving sexual acts with children. In its second review of the case, the Court of Criminal Appeals affirmed the findings and sentence. United States v. Rodriguez, No. NMCCA 9900997, 2007 CCA LEXIS 251, 2007 WL 2059801 (N-M. Ct. Crim. App. July 17, 2007) (unpublished). We granted Rodriquez's petition for grant of review and specified two issues.[1]

Article 67(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(b) (2000), provides that an accused may petition this court for review of a decision of a Court of Criminal Appeals within sixty days from the earlier of the date upon which the

---

[1] We specified review of the following issues:

> I. WHETHER THE MILITARY JUDGE IMPROPERLY SHIFTED THE BURDEN OF PROOF TO APPELLANT IN ASKING APPELLANT TO EXPLAIN THE VICTIM'S MOTIVES IN ACCUSING HIM OF SEXUAL ABUSE.
>
> II. WHETHER THIS COURT HAS JURISDICTION TO CONSIDER APPELLANT'S UNTIMELY PETITION IN LIGHT OF BOWLES v. RUSSELL, 127 S. Ct. 2360 (2007).

66 M.J. 488 (C.A.A.F. 2008).

accused is actually notified or the date upon which he or she is constructively notified of the decision of the Court of Criminal Appeals. While there is no dispute in this case that the petition for grant of review was filed outside the sixty-day period, Rodriguez asserts that under this court's prior case law that period is nonjurisdictional and can be waived in this court's discretion. See United States v. Tamez, 63 M.J. 201, 202 (C.A.A.F. 2006) (per curiam). The Government responds that the statutory time limitation of Article 67(b), UCMJ, constitutes a mandatory congressional limitation and is not subject to waiver or expansion in the same manner as rule-based or court-created limitations.

In light of Bowles v. Russell, 127 S. Ct. 2360 (2007), we conclude that the congressionally-created statutory period within which an accused may file a petition for grant of review is jurisdictional. As Rodriguez's petition for grant of review was filed outside that period, we lack the authority to entertain it. We therefore vacate the grant of review in this case and dismiss the petition for grant of review.

Background

The Court of Criminal Appeals issued its second decision in this case on July 17, 2007. The record of trial reflects that a copy of that decision was served upon Rodriguez's appellate defense counsel on that same day. On September 28, 2007, appellate defense counsel filed a "Motion to Submit Petition for Grant of Review Out of Time." In that motion appellate defense counsel stated that the "petition for grant of review [was] out of time by thirteen days" because "Appellant did not contact the Appellate Defense Division of the Navy-Marine

Corps Appellate Review Activity until September 27, 2007 in order to express his desire to appeal his case to this Court." On that same day, this court ordered the Government to file an answer to Rodriguez's motion and held further action on the petition for grant of review in abeyance until the court acted upon the motion to file out of time.

On October 12, 2007, the Government moved to file an opposition to Rodriguez's motion to file his petition for grant of review out of time. The Government asserted that Rodriguez failed to demonstrate good cause for the court to suspend the sixty-day period within which to file a petition for grant of review.[2]

On November 16, 2007, this court granted Rodriguez's motion to file his petition for grant of review out of time and ordered that he file a supplement to the petition for grant of review. Upon further consideration of the supplement to the petition for grant of review and the other filings, we specified two issues for review including one which framed the issue as to whether this court has jurisdiction to entertain an untimely petition for grant of review. See Loving v. United States, 62 M.J. 235, 239 (C.A.A.F. 2005) ("every federal appellate court has a special obligation to 'satisfy itself . . . of its own jurisdiction'" (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986))).

Discussion

When originally enacted as part of the

---

[2] C.A.A.F. R. 33 provides that "[f]or good cause shown, the Court may suspend any of these rules in a particular case, on application of a party or on its own motion, and may order proceedings in accordance with its direction."

Uniform Code of Military Justice in 1950,[3] Article 67(c) provided that an accused "shall have thirty days from the time he is notified of the decision of a board of review [now Court of Criminal Appeals] to petition the Court of Military Appeals [now the Court of Appeals for the Armed Forces] for a grant of review." Act of May 5, 1950, ch. 169, Pub. L. No. 81-506, 64 Stat. 107, 129-30 (Article 67(c)). Consistent with this congressional limitation, former Rule 21 of the court's Rules of Practice and Procedure required that a petition for grant of review be filed with the court within thirty days of the appellant receiving written notice of the lower court's decision. The court did not, however, view this thirty-day limitation as a jurisdictional bar to entertaining petitions for grant of review that were filed outside the statutory period. See United States v. Ponds, 1 C.M.A. 385, 386, 3 C.M.R 119, 120 (1952) (per curiam) (quoting Rule 21 of the Court of Military Appeals' Rules of Practice and Procedure, effective from July 11, 1951, to March 1, 1952).

In Ponds, the court considered whether a petition for grant of review filed forty-six days after the statutory filing period elapsed should be dismissed. Id. Rather than view the statutory filing period as jurisdictional, the court concluded that if an appellant could "establish some reasonable basis justifying his relief from [this] default" then untimely filing would not be a bar to this court's consideration of the case. Id. This conclusion was rendered in the context of the court expressing disapproval of agreements to waive the right to

---

[3] Act of May 5, 1950, 50 U.S.C. §§ 551-736 (1950) (repealed 1956).

petition and reflected the court's underlying belief that "[t]he right of convicted persons freely and directly to petition this Court must be protected fully and in nowise abridged." Id. at 387, 3 C.M.R. at 121.[4]

Following Ponds, this court adhered to its conclusion that an otherwise untimely petition for grant of review could be accepted by the court for good cause. See, e.g., United States v. Morris, 16 M.J. 101 (C.M.A. 1983) (misunderstanding of filing requirements); United States v. Landers, 14 M.J. 150 (C.M.A. 1982) (misunderstanding that may have been caused by the change of the statutory filing period from thirty to sixty days); United States v. Mills, 12 M.J. 225, 227 (C.M.A. 1982) ("misunderstanding directly or indirectly engendered by those responsible for serving upon him the decision of the Court of Military Review").

As those cases indicate, the court viewed the statutory filing period as nonjurisdictional even after Article 67, UCMJ, was amended in 1981 to extend the filing period to sixty days and to provide for constructive service of Court of Criminal Appeals' decisions. See Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085, 1088-89 (1981) (Article 67(c)). Most recently, in Tamez the court reiterated that "the time limits in Article 67, UCMJ, are not jurisdictional" and that the court could exercise its discretion to accept untimely petitions for grant of review "for good cause shown." 63 M.J. at 202.

However, in 2007 the United States Supreme

---

[4] See also United States v. Cummings, 17 C.M.A. 376, 379, 38 C.M.R. 174, 177 (1968); United States v. Doherty, 10 C.M.A. 453,455, 28 C.M.R. 19, 21 (1959).

Court changed the analytical landscape in terms of evaluating the jurisdictional significance of filing deadlines in appellate practice. In Bowles the Supreme Court considered Fed. R. App. P. 4(a)(1)(A), based upon 28 U.S.C. § 2107(a), and Fed. R. App. P. 4(a)(6), based upon 28 U.S.C. § 2107(c). 127 S. Ct. at 2362-63. Respectively, those rules provide that a civil litigant has thirty days to file a notice of appeal after entry of final judgment by a Federal District Court and that a District Court could extend the filing period for fourteen days. Nonetheless, the District Court in Bowles extended the filing period for seventeen days rather than the fourteen days permitted by Fed. R. App. P. 4(a)(6). Id. at 2362. When Bowles filed his notice of appeal, he did so outside the rule's fourteen day period but within the seventeen days encompassed by the District Court's order. Id. The Supreme Court concluded that Bowles' untimely notice of appeal "deprived the Court of Appeals of jurisdiction." Id. at 2366.

The Supreme Court held that where a limitation is derived from a statute "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" Id. at 2363 (citations omitted). In so holding, the Court distinguished between statute-based rules of limitation and those having their origin in court-created rules. There is "jurisdictional significance [in] the fact that a time limitation is set forth in a statute . . . [b]ecause '[o]nly Congress may determine a lower federal court's subject-matter jurisdiction.'" Id. at 2364 (quoting Kontrick v. Ryan, 540 U.S. 443, 452 (2004)). In contrast to the rule for statute-based limitations, the Court noted that: [W]e have treated the rule-based time limit for criminal cases differently, stating that it may be waived

because "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion. Id. at 2365 (quoting Schacht v. United States, 398 U.S. 58, 64 (1970)). An important distinction between the jurisdictional statute-based limitations and those created within a court's internal rules is that the courts have "no authority to create equitable exceptions to jurisdictional requirements." Id. at 2366.

The Court illustrated this distinction by pointing to its own rules regarding the time limits for filing petitions for certiorari. The Supreme Court's rules provide a ninety-day filing deadline for certiorari in both civil and criminal cases. Id. at 2365 (citing Sup. Ct. R. 13.1). While the Court's jurisdiction over criminal appeals derives from rule-based limitations that can be waived, the Court noted that the ninety-day limitation for civil cases derives from 28 U.S.C. § 2101(c) and therefore the statute-based rule for civil cases constitutes a jurisdictional limitation on the Court's authority to entertain petitions for certiorari in civil cases. Id.

The Federal Circuit Courts of Appeals have followed the Bowles statutory/rule-based distinction in interpreting various filing deadlines. The First Circuit applied this analysis in determining that Fed. R. Crim. P. 35(a) was jurisdictional "because the rule's seven-day time limit derives from a statute -- [18 U.S.C.] § 3582(c)."[5] United States v. Griffin, 524

---

[5] Fed. R. Crim. P. 35(a) deals with correcting clear errors in sentencing and provides: "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error."

F.3d 71, 84 (1st Cir. 2008). Similarly, the Second Circuit concluded that the exhaustion requirement applicable to petitions for review of an immigration judge's order was "statutory and jurisdictional." Grullon v. Mukasey, 509 F.3d 107, 109 (2d Cir. 2007). The Sixth Circuit concluded that Fed. R. Civ. P. 59(e) was a "claim-processing rule" which "[u]nlike the rule at issue in Bowles, . . . [was] promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C. §§ 2071-72."[6] Nat'l Ecological Found. v. Alexander, 496 F.3d 466, 475 (6th Cir. 2007).[7]

We also note that a number of the Federal Circuit Courts of Appeals had previously held that Fed. R. App. P. 4(b), "Appeal in a Criminal Case," was jurisdictional but have reversed that conclusion in light of Bowles and the fact that the rule is not based in statute, despite the seemingly mandatory language of the rule.[8] See United States v. Frias, 521 F.3d 229, 232 (2d Cir. 2008); United States v. Garduno, 506 F.3d 1287, 1290-91 (10th Cir. 2007); United States v. Martinez, 496 F.3d 387, 388 (5th Cir. 2007); cf. United States v. Byfield, 522 F.3d 400, 403 (D.C. Cir. 2008). In light of the statutory/rule-based analysis established in Bowles and the

---

[6] Fed. R. Civ. P. 59(e) provides: "A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment."

[7] See also Kingman Reef Atoll Invs., L.L.C. v. United States, 541F.3d 1189, 1195-96 (9th Cir. 2008); Niswanger v. Powell, 282 F.App'x 342, 343 (5th Cir. 2008); West v. Norfolk, 257 F. App'x606, 607 (4th Cir. 2007); United States v. Smith, 238 F. App'x356, 359 (10th Cir. 2007) (timely notice of appeal "mandatory and jurisdictional" under Fed. R. Crim. P. 35).

[8] Fed. R. App. P. 4(b)(1)(A) provides, in part: "In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days of the later of . . ."

subsequent circuit court decisions, it is appropriate for us to once again examine Article 67(b), UCMJ. "[T]he entire system of military justice [is a] creature[] of statute, enacted by Congress pursuant to the express constitutional grant of power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (quoting U.S. Const. art. I, § 8, cl. 14; and citing William Winthrop, Military Law and Precedents 17 (2d ed. 1920)). In Articles 141 through 146, UCMJ, 10 U.S.C. §§ 941-946 (2000), Congress provided the source authority for the existence of this court. This court's authority or subject matter jurisdiction is defined by Article 67, UCMJ.[9] See Clinton v. Goldsmith, 526 U.S. 529, 535 (1999) (stating this court's "independent statutory jurisdiction is narrowly circumscribed").

Article 67(a), UCMJ, sets forth three categories of cases that Congress requires this court to review:

> (a) The Court of Appeals for the Armed Forces shall review the record in –
>
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for Review; and
>
> (3) all cases reviewed by a Court of Criminal

---

[9] The structure of appeal under the UCMJ is different than that established under the Fed. R. App. P. The latter, as noted, is both statute-based and rule-based, while the entire structure of military justice, including appeals, is statute-based.

Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

Pertinent to this case is subsection (a)(3) which directs this court to review cases which have been reviewed by a Court of Criminal Appeals and where there is a "petition of the accused" and "good cause shown." The statute clearly establishes that both of these predicates must exist before the congressional mandate to review a case arises.

Article 67(b), UCMJ, sets forth the criteria for filing a petition with this court:

> (b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of –
>
> (1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or
>
> (2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery . . . .

While the option of whether to petition or not petition the court rests with the appellant ("may"), Congress established without qualification when such petitions must be filed. Under the plain language of the statute, the petition must be filed within the sixty-day statutory time limit.

Although we believe that the timeliness language of the statute is clear, unambiguous and mandatory, Rodriguez argues that despite the

statutory/rule-based distinction of Bowles, the use of the word "may" renders the time limitation in this statue permissive rather than mandatory. However, a reading of the plain language clearly reflects that the word "may" refers only to the act of petitioning this court. See United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) ("Statutory construction begins with a look at the plain language of a rule." (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42 (1989))).

As we read the plain language of Article 67(b), UCMJ, an appellant may file a petition for grant of review and, if he or she chooses to do so, it must be done within the sixty-day time limitation. Nothing within Article 67(b)'s statute-based time limitation is permissive and there is no indication that the court can waive the limitation for equitable reasons. The sixty-day period "governs this case [and] is specific and unequivocal." See Clark v. Lavallie, 204 F.3d 1038, 1040 (10th Cir. 2000) (dealing with statute-based Fed. R. App. P. 4(a)(6)).

Even if we were to conclude that there is some ambiguity in these statutes, the legislative history of Article 67(b), UCMJ, provides a clear picture of congressional intent. Congress amended Article 67, UCMJ, in 1981, extending the period within which to petition this court from thirty to sixty days and providing a method for constructive service of a Court of Criminal Appeals' decision. Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085, 1088-89 (1981) (Article 67(c)). A primary motivation for the 1981 amendments to Article 67, UCMJ, was to provide a means of ensuring finality to cases. The House Report on the Military Justice Amendments of 1981 noted the "concrete evidence . .

. that in some instances appellate review of cases could not be completed" and that such cases could be "held in limbo for up to five years with no finality in sight." H.R. Rep. No. 97-306, at 7 (1981). Concerning the purpose of the amendment, the House Report states:

> This amendment would continue to allow the opportunity to petition for a further review to expire by statute upon passage of time after the accused is notified of the adverse decision of the lower court, but in contrast, the current proposal would permit the period to commence running upon either actual notice or constructive notice by mail.

Id. at 8 (emphasis added). The Senate Report expresses a similar concern for finality. The Senate Report states that Article 67, UCMJ, allows "the opportunity to petition for further review to expire by statute" and states further:

> Once again, however, one must note that the right to appeal is not effected [sic]. Instead, the result is that the opportunity lapses. Furthermore, the opportunity lapses only when a variety of factors --all in the control of the accused -- compound.

S. Rep. No. 97-146, at 35-36 (1981) (emphasis added). This legislative history reflects that Congress intended the sixty-day period to be a statute–based limitation and mandatory. The reports of both the House and the Senate focus on the fact that an appellant is in sole control of the decision to appeal and in large measure in control of the effectiveness of service of process.

Article 67(c), UCMJ, as originally enacted, stated that an accused "shall have thirty days" to petition for a grant of review. (emphasis added). Act of May 5, 1950, ch. 169, Pub. L. No. 81-506, 64 Stat. 107, 129-30 (Article 67(c)). Although the 1981 amendment to Article 67(c) provided that the accused "may" petition for review within sixty days, the mandatory nature of the statutory filing period was not altered. As noted in the House Report, the amendment "continue[d] to allow the opportunity to petition for a further review to expire by statute." H.R. Rep. No. 97-306, at 8 (emphasis added). Only the opportunity to petition for review is permissive; the time within which to do so is not. Any other construction of the relationship between opportunity to petition and the time within which to file is inconsistent with the expressed congressional desire to achieve finality. If the time limitation is triggered and an accused does not act, Congress intended the matter to end.

We conclude that the opportunity to petition this court "lapses" or "expires by statute" when the sixty-day statute-based limitation is not met and that the sixty-day limitation is jurisdictional and mandatory.[10] Relief from that time limitation does

---

[10] The structure of appeal under the UCMJ is different than that established under the Fed. R. App. P. The latter, as previously noted, is both statute-based and rule-based. Thus, Fed. R. App. P. 4(b) dealing with criminal appeals which is rule-based is not jurisdictional. On the other hand, the entire structure of military justice, including appeals, is statute-based. This foundational difference creates an inconsistency between the civilian criminal appellate process and the military criminal appellate process with respect to time limitations. However, that apparent inconsistency is an issue for congressional consideration.

not rest in the discretion of the court.[11] To the extent that Tamez and earlier cases of this court are inconsistent with this holding, they are overruled.[12]

There is no dispute that Rodriguez's petition for grant of review was untimely and therefore it must be dismissed.

Decision

The grant of review dated June 12, 2008, is vacated and the petition for grant of review is dismissed.

EFFRON, Chief Judge (dissenting):

In Bowles v. Russell, 127 S. Ct. 2360, 2364 (2007), the Supreme Court reaffirmed its "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and noted that the Court's decisions had "recognized the jurisdictional significance of the fact that a time

---

[11] Our conclusion that Article 67(b), UCMJ, is mandatory and jurisdictional does not wholly preclude an accused from seeking review by this court. An accused may still ask the Judge Advocate General to certify the case for review pursuant to Article 67(a)(2), UCMJ.

[12] Our holding is limited to petitions for grant of review filed under Article 67(b), UCMJ. We reserve for another case whether and under what circumstances the court may waive other, nonjurisdictional filing periods set forth in this court's rules. Compare United States v. Frias, 521 F.3d 229, 234 (2dCir. 2008) ("When the government properly objects to the untimeliness of a defendant's criminal appeal, Rule 4(b)[a court-prescribed rule] is mandatory and inflexible."), with United States v. Ortiz, 24 M.J. 323, 325 (C.M.A. 1987)(indicating that the court will seek "adequate explanations" for "untimeliness which violates this Court's Rules" regarding filing supplements to petitions for grant of review).

limitation is set forth in a statute." The Court stated that a limitation is "jurisdictional when Congress forbids federal courts from adjudicating an otherwise legitimate class of cases after a certain period has elapsed from final judgment." Id. at 2366 (quotation marks omitted). If Congress has forbidden our Court from adjudicating an otherwise legitimate petition for review after the passage of a certain period of time, we may not review the petition even if the accused can establish good cause for not meeting the statutory filing deadline. See id.

The majority opinion concludes that Congress established such a prohibition in Article 67, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867 (2000). United States v. Rodriguez, ___ M.J. ___ (3) (C.A.A.F. 2009). For the reasons set forth below, I respectfully disagree.

The jurisdictional statute

Article 67 differs from the statute at issue in Bowles in significant respects. Congress restricted appeals under the Bowles statute, 28 U.S.C. § 2107, and left courts with limited discretion to reopen the filing period under specified circumstances:

> (a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.
>
> . . . .
>
> (c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal,

extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds --

> (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
>
> (2) that no party would be prejudiced,
>
> the district court may, upon motion filed within180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal. 28 U.S.C. § 2107 (2000).

By contrast, Congress framed Article 67 as a requirement to review cases, not as a limitation on review:

> (a) The Court of Appeals for the Armed Forces shall review the record in --
>
> (1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to

> death;
>
> (2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and
>
> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review. Article 67, UCMJ.

The phrase "shall review" embodies a congressional mandate to conduct appellate proceedings in the three categories of cases. See 10 U.S.C. § 101(f)(1) (2000) (providing that in Title 10 of the United States Code, the word "'shall' is used in an imperative sense").

In the statutory provision governing a servicemember's ability to petition for review under Article 67, Congress used permissive language: "The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of" the date of actual service or the date of constructive service. Article 67(b), UCMJ; see 10 U.S.C. § 101(f)(2) (providing that in Title 10 of the United States Code, the word "'may' is used in a permissive sense"). Notably, Congress did not employ the formula provided in Title 10 for the use of "may" in a restrictive sense. See 10 U.S.C. § 101(f)(3) (providing that in Title 10 of the United States Code, the phrase "'no person may . . .' means that no person is

required, authorized, or permitted to do the act prescribed").

Congress also provided in Article 67(b) that this Court "shall act upon such a petition promptly in accordance with the rules of the court." The Court's rules contain the sixty-day time period for filing a petition, C.A.A.F. R. 19(a), as well as express authority to waive the rules. C.A.A.F. R. 33.

Background: Development of the statute

The initial version of the UCMJ contained the following provision concerning opportunity of the accused to file a petition for review:

> The accused shall have thirty days from the time he is notified of the decision of a board of review to petition the Court of Military Appeals for a grant of review. The court shall act upon such a petition within thirty days of the receipt thereof.

Act of May 5, 1950, ch. 169, art. 67(c), 64 Stat. 107, 129-30 (1950) (codified as amended at 10 U.S.C. § 867(b) (2000)).

From the first cases arising under the UCMJ, Article 67 has been interpreted as permitting consideration of petitions filed beyond the statutory time period upon a showing of good cause. See United States v. Ponds, 1 C.M.A. 385, 386 3 C.M.R. 119, 120 (1952). Over the next three decades, the good cause interpretation represented the state of the law in the military system.

In 1981, the Department of Defense requested amendments to Article 67 with respect to notice of the opportunity to petition for review, focusing on problems in identifying the time that marked the beginning of the opportunity to petition this Court for review. See United States v. Byrd, 53 M.J. 35, 36 (C.M.A. 2000). The proposed legislation sought relief from our decision in United States v. Larneard, 3 M.J. 76 (C.M.A. 1977), which held that constructive service of the lower court's decision would not suffice to initiate the period for review and thereby precluded the running of the filing period in the absence of proven actual notice. See S. Rep. No. 97-146, at 35 (1981).

Congress agreed with the Department and enacted authority for constructive notice, thereby overcoming the effect of Larneard. Military Justice Amendments of 1981, Pub. L. No. 9781, § 5, 95 Stat. 1088-89 (1981) (codified as amended at 10 U.S.C. § 867 (2000)). Under the constructive notice provision, the timeline for the opportunity to petition for review commences when the government provides either actual or constructive notice of the lower court's decision. Three other legislative changes accompanied the constructive notice provision as part of the 1981 amendments, each of which underscore the nonrestrictive nature of the legislation. First, Congress inserted the permissive phrase "may petition" into the statute. Second, the statute expanded the opportunity to file a petition for review from thirty days to sixty days. Third, the legislation replaced the language providing that this Court "shall act" within thirty days with a more flexible requirement to act "promptly in accordance with the rules of the court." See id.

The legislative history of the 1981 amendments, although not necessary for interpretation of this statute, is consistent with a permissive reading of the legislation. The report of the House Armed Services Committee emphasized the continuity of the opportunity to petition for review, and noted that the legislation addressed the relationship between notice and the commencement of the filing period:

> This amendment would continue to allow the opportunity to petition for a further review to expire by statute upon passage of time after the accused is notified of the adverse decision of the lower court, but in contrast, the current proposal would permit the period to commence running upon either actual notice or constructive notice by mail. However, the period for petition would be extended from 30 to 60 days. . . .
>
> In effect, the amendment would authorize giving an accused constructive notice of his right to petition the Court of Military Appeals if efforts to make personal service have failed.

H.R. Rep. No. 97-306, at 8 (1981).

The Senate report also described the statute as providing an opportunity for review and emphasized that the accused would lose the opportunity to petition only if the responsibility for the late filing was attributable to that individual:

> [O]ne must note that the right to appeal is not [affected]. Instead, the result [of the sixty days passing without a petition filing] is that the opportunity lapses. Furthermore, the opportunity lapses only when a variety of factors -- all in the control of the accused -- compound. In this respect, the waiver would not be precisely "unknowing" on the accused's part. An accused who is interested in preserving appellate opportunities may protect those opportunities by supplying the power of attorney, or by taking care to keep addresses current, or by maintaining contact with his appellate counsel. Thus, an unfortunate result is likely to occur only when the accused intentionally or negligently fails to take simple

> measures to protect the accused's own interests, measures which must be explained by both the trial and appellate defense counsel.

S. Rep. No. 97-146, at 36. Both reports are consistent with the then-existing state of the law, under which the opportunity to petition for review would expire after the statutory number of days, subject to the ability of the accused to establish, through a showing of good cause, that the late filing was not a matter within his or her control. It is noteworthy that while Congress addressed this Court's interpretation of Article 67 to establish a constructive notice provision in light of Larneard, the amended statute did not seek to supplant the Ponds line of cases.

Interpretation of Article 67 after the 1981 amendments

In the immediate aftermath of the 1981 legislation, the amended statute was interpreted as permitting late filing upon good cause. See, e.g., United States v. Landers, 14 M.J. 150(C.M.A. 1982). If that interpretation had been in error, the legislative process provided an excellent opportunity for corrective action during congressional consideration of the Military Justice Act of 1983, Pub. L. 98-209, 97 Stat. 1393 (1983). That legislation contained significant changes to posttrial procedures, including the appellate process, with particular attention to the impact of this Court's case law. See, e.g., S. Rep. No. 98-53, at 28 (1983). Notwithstanding the specific focus on appellate matters in the 1983 legislation, Congress did not enact any changes to the longstanding, permissive consideration of belated

petitions upon a showing of good cause.

Article 67(b) has operated as intended by Congress. The constructive service provision has enabled the Government to establish an earlier beginning point for the opportunity to submit a petition via constructive service. The sixty-day opportunity for filing a petition for review identifies the period within which the accused is responsible for filing a petition. The permissive interpretation of Article 67 follows the statutory rule of construction in 10 U.S.C. § 101(f)(2) and provides a very limited basis for appellate review when the accused establishes that a belated filing is not the result of his or her own irresponsibility. See H.R. Rep. No. 97-306, at 7-8; S. Rep. No. 97-146, at 36.

As Judge Baker points out in his separate opinion, the permissive interpretation is consistent with the intent of Congress in enacting the UCMJ and in establishing this Court. ___ M.J. at ___ (12) (Baker, J., dissenting). See also United States v. Tamez, 63 M.J. 201, 202 (C.A.A.F. 2006) (noting that the unchanging practice of our Court in considering belated petitions upon good cause shown "is consistent with Congress's intent that servicemembers have the opportunity to obtain appellate review in an independent civilian court").

The permissive reading also is consistent with the manner in which Congress has structured the military justice system, particularly the system's reliance on government-furnished military counsel to represent military personnel in the appellate process. See Article 70, UCMJ. 10 U.S.C. § 870 (2000). When a servicemember relies on a military attorney and the petition is filed late because of incorrect advice or inaction by the military attorney,

the Ponds interpretation of Article 67 provides an appropriate occasion for the servicemember to demonstrate that the belated filing is the responsibility of the government-provided attorney, not the individual servicemember. See Byrd, 53 M.J. at 36-37.

In a number of cases now pending before the Court, appellants allege that the responsibility for the late filing rests with military appellate counsel. These cases include alleged deficiencies in case tracking, see United States v. Greenwood, No. 08-0618/AF; United States v. Tuberville, No. 080612/AF; alleged neglect of an attorney's commitment to file a timely petition, see United States v. Angell, No. 09-0098/AR; and alleged failure to ensure continuity of counsel after departure of assigned military appellate counsel, see United States v. Person, No. 08-0534/NA; United States v. Esposito, No. 08-0547/NA. Under the lead opinion's interpretation of Article 67, however, every case involving a belated filing must be dismissed without regard to whether the appellant can establish that the responsibility for the filing deficiency rests with the military attorney furnished by the government under Article 70. Such a result is not required by the language, development, or purpose of Article 67.

The opportunity to demonstrate good cause for a belated filing comports with the permissive wording of the statute, the statutory rules of construction for Title 10, the legislative history of Article 67, the purpose of the UCMJ, the consistent interpretation of the statute, and subsequent legal developments. As such, Article 67 does not constitute a congressional prohibition on appellate review under Bowles. I respectfully dissent from the lead

opinion's conclusion that Congress established Article 67 as a mandatory prohibition that precludes appellate review irrespective of whether there is good cause for a belated filing.

BAKER, Judge (dissenting):

Introduction

Today the Court reverses more than fifty years of military justice precedent and practice based on Bowles v. Russell, 127 S. Ct. 2360 (2007), a Supreme Court case addressing the time for appeals under the federal habeas statute, 28 U.S.C. § 2107 (2000). In Bowles, the Court concluded that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional'" and that 28 U.S.C. § 2107(c) prescribed such a time limit based on the text of the statute. 127 S. Ct. at 2363 (citation omitted). However, in applying Bowles to this Court's jurisdiction, the majority ignores three critical distinctions.

First, the Bowles Court was addressing a federal civil statute, 28 U.S.C. § 2107, not the Uniform Code of Military Justice (UCMJ).

Second, Congress did not legislate or intend to prescribe this Court's jurisdiction in the same manner as a district court's application of 28 U.S.C. § 2107. Read in the context of the statute as a whole, the language in Article 67, UCMJ, 10 U.S.C. § 867 (2000), defines a permissive right to petition this Court -- an "accused may petition" the Court. Congress did not specifically limit the amount of time in which an accused must file a petition before this Court; it required that this Court review all petitions filed within sixty days. After sixty days,

consideration of a petition is discretionary. Congress had the opportunity to amend this language in light of this Court's interpretation in 1981. It did not. Instead, Congress changed the modal verb in Article 67(b), UCMJ, from "shall" to "may." See Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1085, 1088-89 (1981) (Article 67(c)).

Third, as the Supreme Court recognized in Parker v. Levy, 417 U.S. 733, 743 (1974), as well as in cases subsequent to Bowles, the military justice system is a distinct system. Supreme Court precedent, including precedent involving the death penalty, does not necessarily apply in the military context, or apply as it does in the civilian context. See Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008) ("[A]uthorization of the death penalty in the military sphere does not indicate that the penalty is constitutional in the civilian context.") (order denying rehearing).

As a result, I respectfully dissent. To paraphrase Justice Jackson, this Court should be last, not first, to close the courtroom door to members of the armed forces. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). Congress did not specifically limit this Court's jurisdiction, and we should not do so now. "'[O]nly Congress may determine a lower federal court's subject-matter jurisdiction.'" Bowles, 127 S. Ct. at 2364.

From Ponds to Byrd to Bowles

Since the advent of the UCMJ, this Court has held that the time limits for filing a petition for appeal before this Court do not impose a jurisdictional bar to appeal where there is good cause shown for filing out of time. United States v. Tamez,

63 M.J. 201, 202-03 (C.A.A.F. 2006) (per curiam); United States v. Byrd, 53 M.J. 35, 38 (C.A.A.F. 2000); United States v. Ponds, 1 C.M.A. 385, 387, 3 C.M.R. 119, 121 (1952) (per curiam). The analysis underpinning this longstanding conclusion is summarized in Byrd, a 2000 opinion in which the five judges on this Court unanimously concluded:

> Both Article 67 and Rule 19 are phrased in terms of the opportunity of an appellant to file a petition for review. Neither the statute nor the rule states that the time periods are jurisdictional, nor do they preclude our Court from accepting petitions outside the time period under appropriate circumstances.

53 M.J. at 38.

This analysis was echoed in Tamez, a 2006 per curiam opinion in which this Court again emphasized the importance of civilian oversight of the military instrument, in this case the military justice system, through operation of the United States Court of Appeals for the Armed Forces.

> Such a practice is consistent with Congress's intent that servicemembers have the opportunity to obtain appellate review in an independent civilian court. Were the sixty-day timeline jurisdictional, an appellant might be without appellate recourse in this Court regarding claims such as ineffectiveness of counsel or complaints under Article 13, UCMJ, 10 U.S.C. § 813 (2000). This was not Congress's intent. 63 M.J. at 202-03

(footnote omitted).

The majority now concludes that Bowles changes over fifty years of consistent precedent because "Congress established without qualification when such petitions must be filed[,]" United States v. Rodriguez, __ M.J. __ (13) (C.A.A.F. 2009), and Bowles determined that "[t]here is 'jurisdictional significance [in] the fact that a time limitation is set forth in a statute.'" Id. at __ (8) (quoting Bowles, 127 S. Ct. at 2364). This reasoning is flawed.

First, Bowles does not dictate a result. Rather, it enunciates a rule of interpretation. Where Congress has prescribed a time limit for filing an appeal, that time limit is "'mandatory and jurisdictional.'" Bowles, 127 S. Ct. at 2363 (citation omitted). Conversely, if a time period in a statute does not prescribe a jurisdictional limit, it is not mandatory. In other words, the Supreme Court did not purport to substitute this general principle of statutory construction for the actual statutory language or expressed congressional intent that may exist in a given statute. Not all timelines are jurisdictional. See id. at 2368 (Souter, J., joined by Stevens, J., Ginsburg, J., and Breyer, J., dissenting) ("But neither is jurisdictional treatment automatic when a time limit is statutory, as it is in this case.").

Applying this rule of construction, the Supreme Court concluded that 28 U.S.C. § 2107(c), which addresses reopening the time to file a habeas appeal in an Article III district court, is mandatory and jurisdictional, "[b]ecause Congress specifically limited the amount of time by which district courts can extend the notice-of-appeal period . . . ." Bowles, 127 S. Ct. at 2366 (emphasis added). Fed. R. App. P. 4(a)(6) implements § 2107(c), and provides: "The

district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied . . . ." In contrast, Article 67, UCMJ, does not use comparable prescriptive language.

Second, regardless of what Bowles states or requires, the Supreme Court has repeatedly recognized that military society is distinct from civilian society. As a result, principles of law enunciated by the Supreme Court may apply differently, or perhaps not at all, in military justice practice. See Parker, 417 U.S. at 744 ("Just as military society has been a society apart from civilian society, so 'military law' . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.") (citations omitted).[1] One role this Court plays is to place Supreme Court precedent in the military context. See United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004) ("[W]hen considering how [certain laws] apply in the military context, this Court has relied on Supreme Court civilian precedent, but has also specifically addressed contextual factors involving military life."). Part of

---

[1] This point is driven home by the Supreme Court's denial of reconsideration in Kennedy, 129 S. Ct. at 3 (order denying rehearing). In that case, the Supreme Court did not consider the military death penalty for child rape in its original opinion when it sought to analyze the national consensus for this punishment. Id. at 1. The Court denied a rehearing, stating that Kennedy "involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases . . . ." Id. at 2.

that context is the emphasis Congress placed on the opportunity for servicemembers to appeal convictions to a civilian appellate court within the framework of the UCMJ. The majority of this Court, however, places all its emphasis on a mechanical application of Bowles, but misses the equally compelling language from Parker stressing the potential distinction between civilian and military law.

Third, and most importantly, the question before this Court is not whether Bowles applies, but whether the statute to which we are asked to apply Bowles incorporates a congressionally prescribed time limit for filing appeals or a permissive time limit. Did Congress specifically limit the amount of time within which a servicemember must file an appeal? No. To the contrary, this Court concluded in Byrd and Ponds that Article 67, UCMJ, contains a permissive time limit. The UCMJ limited the amount of time in which an appellant could avail himself of the opportunity to petition this Court and as a matter of right have his petition reviewed. In 1981, Congress had the opportunity to amend this language, in light of this Court's understanding of the law. It chose not to do so, as Chief Judge Effron details in his dissent. Now, based on Bowles, a decision construing different language in a civilian statute, a majority of this Court concludes that this Court's interpretation of Article 67(b), UCMJ, has been wrong since 1952. But while Bowles may give us occasion to revisit the meaning of Article 67, UCMJ, it does not change its meaning.

Article 67, UCMJ

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is

used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997).

Article 67, UCMJ, states:

(a) The Court of Appeals for the Armed Forces shall review the record in --

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of –

. . .

At least two interpretations are plausible. First, one can argue that the language prescribes a time limit for filing an appeal. This is the view of the majority. Under this construction, while an appellant "may" file an appeal, "within 60 days" operates as a firm limit on this Court's jurisdiction and not just a bar on an appellant's opportunity to petition this Court. That is because section (a)(3), defining this Court's jurisdiction for good cause shown, is linked to section (b), and review under section (a)(3) is only triggered "upon petition of the accused." However, if

this reading were correct and compelled, then Ponds, Byrd, and Tamez, et al., would have depended on construing this section as procedural rather than jurisdictional. In that case, Bowles would change the analysis. But Ponds, Byrd, and Tamez, et al., did not rely on this distinction; these cases relied on the plain text of the Article and Congress's intent.

That is because a second interpretation of Article 67(b), UCMJ, is that the clause creates a permissive timeline for an appellant to file a notice of appeal. He must file "within 60 days" to preserve his right to have this Court review his petition. Otherwise, this Court is not obliged to review his petition. But it does not preclude this Court from doing so if good cause is shown "upon petition of the accused." Article 67(a)(3), UCMJ.

This reading of the statute is based on the plain language and, in particular, the modal verbs chosen and not chosen. This construction is also based on the placement of the clause within Article 67, UCMJ. The Court's jurisdiction is defined in section (a) and the appellant's right to petition is defined in section (b). As important, this reading is consistent with the legislative history cited by the majority, the same history that also informed Byrd and Tamez.

Congress knows how to mandate when it wishes to do so. For example, Congress intended that an accused have the opportunity to appeal to this Court, but should not be required to do so, for the appeal of right rests at the Courts of Criminal Appeals. As a result, it chose the modal verb "may" rather than "shall" to delimit an accused's right to seek discretionary review before this Court. See Article 67(b), UCMJ. Whether Congress set a time

limit for an accused to do so is more ambiguous. Congress could have used words like "shall be filed within 60 days" or "must be filed within 60 days," or used words similar to the language at issue in Bowles, "but only if" the accused "files within 60 days." Instead, Congress chose to use only the phrase "within 60 days." Nevertheless, it is reasonable to conclude based on the legislative history that this language represents a filing deadline. But it is a deadline on the accused, not a "specific limitation" on this Court's jurisdiction.

Had Congress wished to "specifically limit" this Court's jurisdiction it would have amended Article 67(a)(3), UCMJ, which addresses this Court's discretionary jurisdiction. For example, Congress could have amended this clause to state that this Court shall hear an appeal "upon good cause shown, provided that such petition is filed within 60 days." Or, if Congress intended to specifically limit this Court's jurisdiction in Article 67(b), UCMJ, it could have directed the filing deadline to this Court rather than the accused. That is what Fed. R. App. P. 4(a)(6), the rule implementing the statute at issue in Bowles, directs by using the words "but only if." The predicate statute is equally express in its mandatory effect: "no appeal shall bring . . . before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree." 28 U.S.C. § 2107(a) (emphasis added). Most importantly, Congress used prescriptive language in defining this Court's jurisdiction in Article 67(a), UCMJ:

(a) The Court of Appeals for the Armed Forces shall review the record in –

. . . .

> (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(Emphasis added.)

Congress knows the difference between "shall" and "may" and between "must" and "may." In this statutory clause, it chose "may." For sure, "may" can convey prescription, as in the case of Bowles, where district courts may hear petitions, but only if the filing deadline is met. Indeed, as the majority notes, in 1981, Congress changed section (b) from "shall" to "may" while extending the period during which an appellant may file a petition to this Court. But Congress did not choose to alter this Court's jurisdiction at the same time. Against the backdrop of twenty-nine years, starting with Ponds, of the Court interpreting this section of the law as a permissive right of an accused to petition, as opposed to a prescription on the jurisdiction of this Court, Congress did not specifically limit this Court's jurisdiction. To the contrary, Article 67(a), UCMJ, continues to state that this Court "shall review" the record in all cases upon petition of the accused and on good cause shown. Thus, the presence of the modal verb "shall" in Article 67(a), UCMJ, is as important as the absence of such a verb in Article 67(b), UCMJ.

Nonetheless, the majority concludes that there is only one possible way to read the statute, and that interpretation is in a manner inconsistent with how Article 67, UCMJ, has been read for over fifty years. Recall, Bowles does not purport to rewrite or change the law; it only insists that courts give full effect to

statutory timelines where "Congress specifically limited the amount of time" within which a court is authorized to hear an appeal. 127 S. Ct. at 2366. Congress has not "specifically limited the amount of time" within which this Court may, of its own accord, consider a petition for review. This conclusion is all the more evident when the statutory text is considered in the context of the statute as a whole.

The Broader Context of the Statute as a Whole

The text of Article 67, UCMJ, does not appear in a vacuum. Rather, it appears within the structure of the UCMJ, which defines a distinct system of military justice based on four pillars relevant to this case.

First, Congress intended that this Court provide civilian oversight of the military justice system through exercise of appellate jurisdiction. This Court's role is to provide for military discipline and to uphold the rights of servicemen and women in the criminal context. Henceforth, such review shall be foreclosed to appellants who are negligent or indecisive in seeking appeal, even when these appellants show good cause for delay. But it will also be denied to appellants whose counsel fail to timely appeal or, where through administrative oversight, the appellate defense offices miss deadlines. And it will be denied to appellants who do not understand the system or how to activate it. These may be just the servicemembers for whom Congress felt civilian review might be particularly important.

Second, Congress recognized that the military justice system would draw on civilian principles of law, but nonetheless operate as a distinct and separate system of justice. The Supreme Court has recognized this distinction, as well. Parker, 417 U.S.

at 743. Most recently, and after Bowles, the Supreme Court reiterated the distinction in Kennedy. 129 S. Ct. at 2 ("The laws of the separate States, which have responsibility for the administration of the criminal law for their civilian populations, are entitled to considerable weight over and above the punishments Congress and the President consider appropriate in the military context.") (order denying rehearing). It is in this context that Congress also intended the exercise of civilian oversight through this Court to buttress public confidence that the military justice system is fair and operates in a manner consistent with constitutional values.

This is especially true in a system where the government determines how physical and human resources are allocated for defense purposes. It is the government that is responsible for staffing the military justice system. It is the government that assigns appellate defense counsel. It is the government that provides administrative support to the appellate defense offices. And, it is the government that provides computer service to these offices. It is also the government that now, at this Court's invitation, seeks to foreclose civilian appellate review in cases where allegations emerge that military appellate counsel provided ineffective assistance of counsel (IAC) or that the government-staffed appellate defense office's processing of the appeal may be flawed.

Third, Congress intended the UCMJ to be applied in a uniform manner across services through operation of a central appellate court. In reversing over fifty years of precedent by foreclosing appeals beyond the permissive sixty-day limit, the Court now invites collateral civilian appellate review in those

cases where legitimate questions of service or constructive service are engaged, or where questions of IAC are alleged.

With the doors to this Court now closed, appellants are left with two possible avenues of appeal. First, appellants could petition the Judge Advocate General (TJAG) to appeal on their behalf using the certification mechanism. Among other things, this would undermine the notion of independent civilian oversight of the military justice system, as the TJAGs would effectively serve as gatekeepers to this Court. It would also remove the "good cause" threshold from this Court's consideration of petitions, but not for certified appeals falling within this Court's mandatory review. Further, there are obvious bureaucratic incentives for the TJAGs, during a time of operational demand and staffing constraints, to limit use of this option if it were used at all.

Second, and more likely, appellants will seek appellate review through the habeas Article III process, including any claims of IAC that might pertain to the failure to timely file a petition. This approach runs contrary to Congress's intent to have a uniform application of the law through exercise of unified appellate jurisdiction. Indeed, there is not only a risk of inconsistent service results, but also a risk of inconsistent approaches to military law between appellate and habeas jurisdictions. This might occur, for example, where an accused challenges the application of a new article in the UCMJ or a change to the Rules for Courts-Martial, but finds this courthouse closed on account of a "late" petition. Good cause would otherwise be shown to consider statutory and manual issues of first

impression reaching across the services. Also, consider that where an accused raises questions of first impression involving the application of constitutional law in military context, these questions will certainly be answered in the Article III context. They should be, absent the opportunity to do so before this Court.

Fourth, Congress designed a deployable and flexible system of military justice with permanent courts in Washington and temporary trial courts in the field. As a result, the military justice system is ill-suited to now address the predicate factual issues that will arise as this Court, the government, and appellants try to identify and demonstrate the moment at which this Court's jurisdiction did or did not expire.[2] For example, consider the prospect that appellants and their counsel will now be compelled to factually contest issues of constructive service in order to demonstrate that they should have the opportunity for this Court to consider their petition. Putting aside the obvious point that judicial economy would be better served by having this Court consider whether there was good cause to grant a petition before litigating the facts, the military justice system is not well-suited to adjudicate the questions of

---

[2] This Court will also need to amend its rules. C.A.A.F. R. 19(a)(3) states that "a petition for grant of review will be deemed to have been filed on the date when the petition has been mailed or delivered by an appellant or by counsel on behalf of an appellant directly to the Court." However, if the sixty-day limit is jurisdictional and mandatory, it must have a definitive termination point. Thus, it must either terminate on the date when a petition is mailed or it terminates on the date that the petition is received. This Court cannot choose between the two when the sixty-day deadline is mandatory and jurisdictional.

jurisdictional fact that Congress avoided and this Court now creates. With no standing trial courts, this will presumably be done using the DuBay hearing mechanism. United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967). Alternatively, Courts of Criminal Appeals might use their factfinding authority, but if so, adverse rulings to an appellant will necessarily have to be appealed using Article III habeas petitions. Did Congress intend that constructive provisions of the UCMJ and ineffective assistance of appellate counsel claims for missing deadlines be adjudicated using the habeas mechanism?

Conclusion

Bowles did not decide that all statutes with timelines are prescriptive, mandatory, and jurisdictional. It decided that, where Congress specifically prescribed a jurisdictional timeline, the timeline was mandatory. Based on the plain language used in Article 67, UCMJ, and the context of the statute as a whole, it is clear Congress did not do so. As a result, Ponds, Byrd, and Tamez remain good law. Given Congress's intended role for this Court, this Court should be last, and not first, to close the courtroom door to military appellants.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Misc. Dkt. No. 07-0900/MC
Crim. App. Dkt. No. 9900997

United States, Appellee

v.

Carlos J. RODRIGUEZ, Appellant

ORDER

On consideration of Appellant's petition for reconsideration of this Court's decision, 67 M.J. 100 (C.A.A.F. 2009); Appellant's motion to attach document of January 9, 2009; Appellee's motion to strike Appellant's petition for reconsideration; and Appellant's motion to attach document of January 26, 2009, it is, by the Court, this 4th day of March, 2009,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied; and

That Appellant's motions to attach and Appellee's motion to strike are denied as moot.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX C

1. 10 U.S.C. 867 provides:

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate

counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record.

The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the

setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

2. 28 U.S.C. 2107 provides:

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review

unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to

bankruptcy matters or other proceedings under Title 11.

3. Fed. R. App. P. 4 provides:

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party

timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment -- but before it disposes of any motion listed in Rule

4(a)(4)(A) -- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal -- in compliance with Rule 3(c) -- within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration

of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a

separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) *Time for Filing a Notice of Appeal.*

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision, sentence, or order -- but before the entry of the judgment or order -- is treated as filed on the date of and after the entry.

(3) *Effect of a Motion on a Notice of Appeal.*

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made

no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order -- but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) -- becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective -- without amendment -- to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) *Motion for Extension of Time.* Upon a finding of excusable neglect or good cause, the district court may -- before or after the time has expired, with or without motion and notice -- extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) *Jurisdiction.* The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence

under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) *Entry Defined.* A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided

in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(2)

No. 08-1465

In the Supreme Court of the United States

CARLOS J. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces (CAAF) correctly held that the 60-day period within which an accused may file a petition for review in the CAAF under Article 67(b) of the Uniform Code of Military Justice, 10 U.S.C. 867(b), is jurisdictional.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 5
Conclusion 10

TABLE OF AUTHORITIES

Cases:

Bowles v. *Russell*, 551 U.S. 205 (2007) 4, 5, 6
Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 9
Clinton v. *Goldsmith*, 526 U.S. 529 (1999) 6
Crandon v. *United States*, 494 U.S. 152 (1990) 8
Dean v. *United States*, 129 S. Ct. 1849 (2009) 7
Middendorf v. *Henry*, 425 U.S. 25 (1976) 8
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10
Ruiz-Martinez v. *Mukasey*, 516 F.3d 102 (2d Cir. 2008) 6
United States v. *Griffin*, 524 F.3d 71 (1st Cir. 2008) 6, 7
United States v. *Kozminski*, 487 U.S. 931 (1988) 8
United States v. *Larneard*, 3 M.J. 76 (C.M.A. 1977) 8
United States v. *Rodriguez*,
No. 9900997, 2002 WL 31433595 (N-M.C.C.A. Oct. 25, 2002) 2
No. 9900997, 2007 WL 2059801 (N-M.C.C.A. July. 17, 2007) 2

Cases—Continued: Page

United States v. *Urutyan*, 564 F.3d 679 (4th Cir. 2009) 6
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9

Constitution, statutes and rules:

U.S. Const. Art. I 6
Military Justice Amendments of 1981, Pub. L. No. 97-81, § 5, 95 Stat. 1088 9
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 67, 10 U.S.C. 867 ..... 2, 4, 6
Art. 67(b), 10 U.S.C. 867(b) ..... *passim*
Art. 125, 10 U.S.C. 925 2
Art. 134, 10 U.S.C. 934 2
8 U.S.C. 1252(b)(1) 6
18 U.S.C. 3582(c) 6
28 U.S.C. 2107(c) 5
Fed. R. App. P.:
Rule 4(a)(1)(A) 5
Rule 4(b) 6
Fed. R. Crim. P. 35(a) 6, 7

Miscellaneous:

H.R. Rep. No. 306, 97th Cong., 1st Sess. (1981) 9
S. Rep. No. 146, 97th Cong., 1st Sess. (1981) 9

In the Supreme Court of the United States

No. 08-1465

CARLOS J. RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-40a) is reported at 67 M.J. 110. The orders of the Navy-Marine Corps Court of Criminal Appeals are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2009. A petition for reconsideration was denied on March 4, 2009 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on May 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a Gunnery Sergeant in the United States Marine Corps, was convicted by general court-martial of

two specifications each of forcible sodomy and indecent acts, in violation of Articles 125 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 925 and 934. He was sentenced to 25 years of imprisonment, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) set aside one specification each of sodomy and indecent acts and authorized retrial on those specifications; it affirmed the remaining findings. No. 9900997, 2002 WL 31433595, at *1 (Oct. 25, 2002). On retrial, petitioner was again convicted of the two remaining specifications and sentenced for all four offenses to 50 years of imprisonment, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. The convening authority reduced the prison term to 20 years but otherwise approved the sentence. The N-MCCA affirmed. No. 9900997, 2007 WL 2059801, at *1 (July 17, 2007). The Court of Appeals for the Armed Forces (CAAF) granted petitioner's petition for review, but then vacated that order and dismissed the petition for lack of jurisdiction. Pet. App. 1a-40a.

1. UCMJ Article 67, 10 U.S.C. 867, authorizes the CAAF to review decisions from service criminal courts of appeals subject to certain conditions and limitations. Article 67(b) provides, in pertinent part:

> The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—
>
> (1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

> (2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first-class certified mail to the accused * * * at the latest address listed for the accused in his official service record.

10 U.S.C. 867(b).

2. a. Petitioner, the father of five children, repeatedly molested two of his daughters—ages 11 and 15 at that time. In April 1998, the victims confided in each other, and the older daughter told a neighbor about the abuse. The neighbor called the military police, which began an investigation that led to petitioner's arrest, prosecution, and convictions by general court-martial. Gov't CAAF Br. 4-5.

b. On July 17, 2007, the N-MCCA issued its second decision, affirming petitioner's convictions and sentence after retrial. That same day, a copy of the N-MCCA's decision was served on petitioner's military appellate defense counsel. On July 24, 2007, another copy of the decision was sent via certified mail to petitioner's last address of record. On September 28, 2007, appellate defense counsel filed a "Motion to Submit Petition for Grant of Review Out of Time" in the CAAF. Counsel stated that the petition was 13 days late because petitioner did not contact the Navy-Marine Corps Appellate Defense Division to express his desire to appeal his case to the CAAF until September 27, 2007. Pet. App. 3a-4a; Gov't CAAF Br. 4.

The government opposed the motion on the ground that petitioner did not show "good cause" for his late petition under CAAF Rule of Practice and Procedure 33.

On November 16, 2007, the CAAF granted petitioner's motion to file his petition out of time. After supplemental briefing, the CAAF specified two issues for review, including the question whether the CAAF possesses jurisdiction to hear an accused's untimely petition for review. Pet. App. 4a.

c. The CAAF ultimately vacated the grant of review and dismissed the petition for lack of jurisdiction. Pet. App. 15a. The CAAF acknowledged that it had previously held that the filing deadline in UCMJ Article 67 was nonjurisdictional and that it had considered untimely petitions in some cases. *Id.* at 4a-6a. But the CAAF stated that this Court in *Bowles* v. *Russell*, 551 U.S. 205 (2007) --holding that a statutory appeal deadline, unlike a rule-based claims processing deadline, was jurisdictional—"changed the analytical landscape" for "evaluating the jurisdictional significance of filing deadlines in appellate practice." Pet. App. 7a. The CAAF recognized that post-*Bowles*, the federal courts of appeals had also distinguished between a statutory appeal deadline, which is jurisdictional, and a rule appeal deadline, which is not. *Id.* at 8a-10a.

Applying *Bowles*, the CAAF held that the statutory 60-day filing deadline in Article 67(b) is jurisdictional. The CAAF stated that "[u]nder the plain language of the statute," a petition for review "must be filed within the sixty-day statutory time limit." Pet. App. 11a. The court rejected petitioner's argument that the provision's use of the term "may" rendered the deadline permissive rather than mandatory. It explained that the term "may" merely permits an accused to file a petition for review if he chose to do so, but the petition nevertheless had to be filed within the 60-day period. *Id.* at 11a-12a. The CAAF also relied on Article 67(b)'s legislative his-

tory, noting that although Congress has amended Article 67(b) to enlarge the filing period from 30 days to 60 days, its motivation was to promote finality. *Id.* at 12a-14a.

Judge Effron dissented on the ground that *Bowles* involved a statute that restricts appellate review, whereas in his view Article 67(b) mandates CAAF review. He noted that the CAAF had previously held that Article 67(b) was not jurisdictional and that the legislative history of Article 67(b) supported that view. Pet. App. 15a-26a.

Judge Baker dissented on grounds that *Bowles* did not address a military statute; that Congress' use of the term "may" in Article 67(b) meant that the statute was not mandatory; and that the unique nature of the military justice system required the conclusion that Article 67(b) is not jurisdictional. Pet. App. 26a-40a.

ARGUMENT

Petitioner contends (Pet. 2-14) that the CAAF erred in holding that Article 67(b)'s 60-day deadline for filing a petition for review is jurisdictional and therefore precludes it from considering an untimely petition. The CAAF correctly applied *Bowles* v. *Russell*, 551 U.S. 205 (2007), to Article 67(b), and its decision does not conflict with any decision of this Court or of any federal court of appeals. Further review is unwarranted.

1. The CAAF's holding that the statutory filing deadline in Article 67(b) is jurisdictional is consistent with this Court's decision in *Bowles* and its application by the federal courts of appeals. In *Bowles*, the Court held that the time limits prescribed in Fed. R. App. P. 4(a)(1)(A) and 28 U.S.C. 2107(c) are jurisdictional and that the court of appeals thus lacked authority to con-

sider an appeal filed outside of those time limits—notwithstanding the district court's explicit entry of an order permitting an untimely appeal in that case. The Court explained that "statutory time limits for taking an appeal [are] jurisdictional." *Bowles*, 551 U.S. at 210. The Court reasoned that because Congress decides which cases the federal courts have jurisdiction to consider, Congress can "determine when, and under what conditions, federal courts can hear them." *Id.* at 213. The Court distinguished statutory deadlines from rule-based deadlines, which it deemed to be nonjurisdictional claim-processing rules. *Ibid.*

Post-*Bowles*, the courts of appeals uniformly have held that the violation of a statutory deadline for taking an appeal is a jurisdictional defect, whereas the violation of a rule-based deadline is not. Compare, *e.g.*, *United States* v. *Griffin*, 524 F.3d 71, 82-84 (1st Cir. 2008) (seven-day window for correcting a sentence in Fed. R. Crim. P. 35(a), as referenced and incorporated in 18 U.S.C. 3582(c), is jurisdictional); and *Ruiz-Martinez* v. *Mukasey*, 516 F.3d 102, 118-119 (2d Cir. 2008) (30-day deadline in 8 U.S.C. 1252(b)(1) for filing petition for review from final removal order is jurisdictional), with *e.g.*, *United States* v. *Urutyan*, 564 F.3d 679, 684-686 (4th Cir. 2009) (non-statutory deadline in Fed. R. App. 4(b) for seeking appeal in criminal case is not jurisdictional).

2. Consistent with those cases, *Bowles* requires the conclusion that the statutory deadline within which an accused may appeal under Article 67(b) is jurisdictional, as the CAAF correctly held. The jurisdiction of military appellate courts, as Article I courts, is strictly limited to the bases of jurisdiction expressly conferred upon them by statute. See *Clinton* v. *Goldsmith*, 526 U.S. 529, 533-534 (1999). In Article 67, Congress conferred jurisdic-

tion on the CAAF to review the record in certain cases reviewed by a service court of criminal appeals, pursuant to specified terms and conditions. As relevant here, Article 67(b) states that "[t]he accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of" receiving actual or constructive notice. 10 U.S.C. 867(b). That text explicitly requires a military defendant who desires CAAF review to file a petition within a certain time (*i.e.*, 60 days from the notice date), and thereby bars a defendant from seeking CAAF review after 60 days.

Petitioner argues (Pet. 9-10) that Article 67(b) provides an option for the accused to appeal, but does not establish a compulsory deadline for the court, because it states that an accused "may" petition the CAAF, whereas the statute in *Bowles* used the term "shall." As used in Article 67(b), however, the term "may" means that an accused is permitted to petition the CAAF for review of his adverse court of criminal appeals decision, but he is not required to do so. But if he elects to petition, the phrase "within 60 days" makes clear that he must do so within the specified time limit. That interpretation finds support in the uniform holdings of courts of appeals that the statutorily based deadline in Fed. R. Crim. P. 35(a)—stating "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error"—is jurisdictional despite its use of the term "may." See, *e.g.*, *Griffin*, 524 F.3d at 83 n.14 (collecting cases).[1]

---

[1] Petitioner's reliance (Pet. 9-10) on the rule of lenity is misplaced, for at least two reasons. First, Article 67(b)'s imposition of a mandatory filing deadline is not ambiguous, let alone grievously ambiguous. See *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009). Second, Article

Petitioner also argues (Pet. 11-12) that *Bowles* does not apply at all because the nature of the military criminal justice system requires a different rule from the civilian legal system. But the question whether the 60-day filing deadline in Article 67(b) is jurisdictional presents a narrow question of appellate practice that does not implicate the military's need for order and discipline or its ability to provide for the common defense. In any event, even if military exigencies could override Congress's prescription of a filing deadline, the CAAF is the best positioned court to determine whether the unique demands of the military justice system require a contrary result, and it concluded otherwise below. See *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (noting "great deference" to CAAF judgments in areas of the law "peculiar to the military branches").[2]

Nor does the legislative history of Article 67(b) support petitioner's view. In *United States* v. *Larneard*, 3 M.J. 76 (C.M.A. 1977), the Court of Military Appeals (the predecessor to the CAAF) held that Article 67(b)'s clock began running only from actual notice of the service court of criminal appeals' decision to the defendant; constructive notice was insufficient. Responding to the

---

67(b)'s filing deadline does not define a crime or impose punishment, and thus does not implicate the rule's concern of providing fair warning of the boundaries of criminal conduct and limiting selective or arbitrary enforcement. See, *e.g.*, *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); *United States* v. *Kozminski*, 487 U.S. 931, 952 (1988).

[2] Petitioner argues (Pet. 7-8) that it can be difficult for military appellate defense counsel to communicate with appellants because of the routine turnover of military appellate defense counsel and the dispersal of military appellants all over the world. Petitioner's concerns are overstated given the communication technologies widely employed by the military to disseminate information to military personnel.

Defense Department's concern that the actual-notice requirement had resulted in unwarranted delays in the execution of sentences, Congress amended Article 67(b) by providing that the filing period runs from the earlier of actual or constructive notice to the accused. See Military Justice Amendments of 1981 (1981 Amendments), Pub. L. No. 97-81, § 5, 95 Stat. 1088.[3] The relevant Committee reports reveal Congress's intent to promote finality and to have the right to petition the CAAF "expire" or "lapse" after the statutory time period following notice to the accused. H.R. Rep. No. 306, 97th Cong., 1st Sess. 8 (1981); S. Rep. No. 146, 97th Cong., 1st Sess. 35 (1981); see Pet. App. 12a-14a. Those passages support the CAAF's jurisdictional interpretation of Article 67(b).

Petitioner suggests (Pet. 10), based on the lack of an explicit statement by Congress to the contrary (either in the 1981 amendments or thereafter), that Congress must have agreed with the CAAF's previous interpretation of Article 67(b)'s filing deadline as nonjurisdictional.[4] But this Court has repeatedly cast doubt on such claims of congressional ratification by acquiescence. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpreta-

---

[3] At the same time, Congress extended the filing period from 30 days to the current 60 days. See 1981 Amendments § 5, 95 Stat. 1088-1089.

[4] Although the CAAF had previously viewed Article 67(b) as nonjurisdictional (Pet. App. 4a-6a), the CAAF was entitled to reconsider and overrule its prior view based on this Court's guidance in *Bowles*. To the extent any tension remains, it is for the CAAF, not this Court, to harmonize its own decisions. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

tion.") (internal quotation marks omitted; brackets in original) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). In any event, the text of Article 67(b), which is the surest guide to congressional intent, supports the CAAF's view in light of *Bowles* that the 60-day deadline is jurisdictional. See p. 7, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

SEPTEMBER 2009